PP v. ABDUL RASHID RAHMAT

HIGH COURT MALAYA, MELAKA
VAZEER ALAM MYDIN MEERA J
[CRIMINAL APPEAL NO: 41(H)-05-01-2017]
7 SEPTEMBER 2017

CRIMINAL PROCEDURE: *Appeal – Appeal by prosecution – Drug dependant ordered by Magistrate to undergo supervision – Breach of condition in supervision order – Respondent failed to report to police station and charged under s. 6(2)(c) of Drug Dependants (Treatment and Rehabilitation) Act 1983 – Magistrate cautioned and discharged respondent – Whether Magistrate had power and discretion to do so – Criminal Procedure Code, s. 294*

Having undergone tests referred to in s. 4 of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ('the Act'), the respondent was certified to be a drug dependant and subsequently produced before a Magistrate. The Magistrate, upon the recommendation of the rehabilitation officer, issued a supervision order ('SO') pursuant to s. 6(1)(b) and (2) of the Act, ordering the respondent to undergo supervision by an officer at the place specified in the SO for two years. Aside from being required to attend rehabilitation programs, the SO also stipulated that the respondent must report to the police station once every month. The respondent failed to report to the police station and this breach of the SO led to his arrest. He was charged at the Magistrate's Court for an offence under s. 6(2)(c) of the Act. The respondent pleaded guilty to the charge and the Magistrate decided to discharge him with a stern warning and further ordered that he was to report, without fail, once every month at the police station for the period of two years, as stipulated in the SO. Dissatisfied with the said decision and order, the prosecution filed the present appeal on the ground that the Magistrate had erroneously exercised her discretion under s. 173A of the Criminal Procedure Code ('the CPC') in discharging the respondent with an admonition.

Held (dismissing appeal; affirming decision of Magistrate Court):

(1) The prescribed sentence for an offence under s. 6(3) of the Act is mandatory imprisonment of up to three years or to whipping of not exceeding three strokes or both. The Magistrate had cautioned and discharged the respondent as she had the power and discretion to deal with the respondent as such under s. 294 of the Act. Section 173A of the CPC is used without recording a conviction while s. 294 is resorted after the recording of a conviction. From a reading of the notes of proceedings, it could be seen that the Magistrate had recorded a conviction and then proceeded to hear submissions on sentencing. It could be surmised that the Magistrate acted under s. 294 and not s. 173A of the CPC in making her decision. However, throughout the prosecution's submissions, there was no reference at all to s. 294 of the CPC. (paras 4, 5 & 8)

(2) The Magistrate had properly exercised her discretion and, in particular, had given appropriate consideration to the extenuating circumstances under which the offence was committed. The respondent, while admitting that he failed to report to the police station, as ordered in the SO, said that he was under a mistaken belief that his participation at the monthly drug rehabilitation programs was sufficient. The respondent was committed in attending the rehabilitation programs and this was reflective of him fulfilling one of the conditions of the SO. This was a core component of any drug rehabilitation program. Public interest was best served by not imprisoning the respondent. Instead, it was best served by ensuring that he continued with the treatment and rehabilitation. (paras 17, 18 & 19)

Case(s) referred to:
Nordin Yusmadi Yusoff v. PP [1997] 4 CLJ 25 CA ***(refd)***
PP v. Bahar Abu [2007] 4 CLJ 604 HC ***(refd)***
PP v. Idris [1955] 1 LNS 93 HC ***(refd)***
PP v. Lim Hong Chin [1994] 1 CLJ 79 HC ***(refd)***
PP v. Mohamed Nor & Ors [1985] 1 LNS 25 SC ***(refd)***
PP v. Yeong Yin Choy [1976] 1 LNS 119 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 50(2)
Criminal Procedure Code, ss. 173A, 294, 376(3), 377(b)
Drug Dependants (Treatment And Rehabilitation) Act 1983, ss. 4, 6(2)(c), (3)
Penal Code, ss. 411, 414

For the appellant - Effizah Ernie Idris; DPP
For the defendant - Sulaiman Harmain Shah; M/s Sulaiman H Shah & Co

[Editor's note: Appeal from Magistrate's Court Melaka; Criminal Case No: MA-83D-56-01-2017.]

Reported by Najib Tamby

PENGHAKIMAN

Vazeer Alam Mydin Meera J:

[1] The respondent was charged at the Magistrate's Court in Melaka with the following offence under s. 6(2)(c) and punishable under s. 6(3) of the Drug Dependants (Treatment And Rehabilitation) Act 1983 ("the Act"):

> Bahawa kamu pada 21.11.2016, jam lebih kurang 2.00 petang bertempat di Balai Polis Ayer Keroh, di dalam negeri Melaka, sebagai seorang yang diletakkan di bawah Perintah Pengawasan Seksyen 6(1)(b) Akta Penagih Dadah (Rawatan dan Pemulihan) 1983 oleh Mahkamah Majistret Melaka bertarikh 6.5.2016 didapati tidak melaporkan diri di Balai Polis Ayer Keroh sepertimana yang dikehendaki pada setiap 6 haribulan. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 6(2)(c) Akta Penagih Dadah (Rawatan dan Pemulihan) 1983 (Pindaan 1998) dan boleh dihukum di bawah Seksyen 6(3) Akta yang sama.

[2] The facts leading to the charge are as follows:

(i) Some time in 2016, the respondent having undergone tests referred to in s. 4 of the Drug Dependants (Treatment And Rehabilitation) Act 1983 ("the Act"), was certified by a Government medical officer to be a drug dependant. Consequently, the respondent was produced before the Magistrate in Melaka, and the learned Magistrate upon the recommendation of the rehabilitation officer had, for purposes of rehabilitation, issued a supervision order dated 6 May 2016 pursuant to s. 6(1)(b) and (2) of the Act ("the SO"), ordering the respondent to undergo supervision by an officer at the place specified in the order for a period of two years. The SO was tendered and marked as exh. P2 at trial. The part of the SO that is relevant for our purpose reads:

> ... saya, Mohd Asri Bin Abd. Rahman Sidik, seorang Majistret di Melaka Tengah, memerintahkan supaya orang tersebut diletakkan di bawah pengawasan *Pegawai Pemulihan/pegawai polis/pegawai polis tentera/pegawai memerintah selama tempoh 2 tahun di bawah syarat-syarat yang berikut:
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> (a) orang tersebut hendaklah tinggal di kawasan Melaka Tengah;
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> (b) orang tersebut hendaklah sentiasa memberitahu pegawai tempat kediamannya dan tidak boleh menukar tempat kediamannya atau meninggalkan kawasan tempat kediamannya tanpa kebenaran bertulis Ketua Pengarah;
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> (c) orang tersebut hendaklah melaporkan diri di Balai Polis Ayer Keroh (sebagaimana yang ditetapkan oleh Majistret) tidak lewat dari 72 jam dari tarikh perintah ini dan pada 6 hari bulan tiap-tiap bulan calendar antara 6.00 pagi dan 6.00 petang;
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> (d) orang tersebut tidak boleh mengambil, menggunakan atau memiliki apa-apa dadah berbahaya;
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> (e) orang tersebut hendaklah menjalani apa-apa ujian pada bila-bila masa dan di mana-mana tempat sebagaimana yang diperintahkan oleh pegawai; dan
>
> (f) orang tersebut hendaklah menjalani apa-apa program bagi pemulihan penagih dadah yang diadakan oleh Kerajaan.

(ii) The respondent reported to the Ayer Keroh Police Station on 8 May and 6 June 2016 and thereafter failed to do so as ordered in the SO.

(iii) The respondent's failure to report to the Ayer Keroh Police Station was a breach of the conditions stated in the SO. The officer in charge of the Ayer Keroh Police Station lodged a police report on 21 November 2016 and the respondent was arrested at his home on 12 January 2017.

(iv) The respondent was arraigned before the Magistrate's Court in Melaka on 12 January 2017 and charged for an offence under s. 6(2)(c) which was punishable under s. 6(3) of the Act.

(v) En Mohd Radi Abdullah, Penolong Pegawai Antidadah (Gred S27) from Agensi Antidadah Kebangsaan, Negeri Melaka, a person authorised in writing by the Public Prosecutor under s. 376(3) and 377(b) of the Criminal Procedure Code (Revised 1999) ("CPC"), appeared on behalf of the Public Prosecutor as the prosecuting officer, whilst the respondent was represented by Mr Liew, a pupil in chambers assigned by the Malacca Bar Committee's Legal Aid Centre under its Dock Rief Program.

(vi) The respondent pleaded guilty to the charge. The learned Magistrate accepted the plea and convicted the respondent. The learned Magistrate proceeded to hear submissions on sentencing from the learned prosecuting officer and the defence counsel.

(vii) The learned Magistrate having considered all the factors for sentencing, that is both the aggravating and mitigating circumstances as submitted, decided to discharge the respondent with a stern warning and further ordered that he is to report without fail once every month at the Ayer Keroh Police Station for the period of two years as stipulated in the SO. The order of the learned Magistrate reads:

> Maka Adalah Diperintahkan bahawa OKT dilepaskan dengan amaran dan lapor diri di Balai Polis.

[3] The appellant being dissatisfied with that decision and order of the learned Magistrate appealed to this court. The grounds of appeal as stated in the petition of appeal are as follows:

> 3. Perayu tidak berpuas hati dengan hukuman tersebut di atas alasan-alasan berikut:
>
> (a) Puan Majistret yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila telah menjatuhkan suatu hukuman yang tidak setimpal dengan kesalahan yang dilakukan oleh Responden.
>
> (b) Puan Majistret yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila tidak mempertimbangkan bahawa hukuman yang diperuntukkan adalah mewajibkan pemenjaraan;
>
> (c) Puan Majistret yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila tidak mempertimbangkan bahawa Responden telah melakukan satu kesalahan yang serius.
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> 4. Oleh yang demikian, pihak perayu merayu agar hukuman tersebut diketepikan dan satu hukuman pemenjaraan diberikan sebagaimana diperuntukkan di bawah seksyen 6(3) Akta Penagih Dadah (Rawatan dan Pemulihan) 1983.

[4] The learned Deputy Public Prosecutor Cik Effizah Ernie Idrus appeared for the appellant, whilst Encik Sulaiman bin Ahmad Ishak appeared as counsel for the respondent. After hearing submissions from both

the learned DPP and counsel, I affirmed the decision of the learned Magistrate and dismissed the appeal. The appellant now appeals to the Court of Appeal pursuant to s. 50(2) of the Courts of Judicature Act 1964 on a point of law, namely:

> Samada hukuman yang berbentuk mandatori boleh digantikan dengan perintah perlepasan dengan amaran di bawah seksyen 294 Kanun Prosedur Jenayah.

[5] I must say that though one of the grounds of appeal was that:

> Puan Majistret yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila tidak mempertimbangkan bahawa hukuman yang diperuntukkan adalah mewajibkan pemenjaraan;

the learned DPP did not proceed to argue this point by reference to the provisions of s. 294 of the CPC. In fact, the learned DPP submitted that she was of the view that the learned Magistrate had erroneously exercised her discretion under s. 173A of CPC in discharging the respondent with an admonition. The notes of proceedings at p. 12 line 22, which is the relevant part of the learned DPP's submission reads:

> Saya percaya Puan Majistret yang terpelajar juga menggunakan Seksyen 173A sub seksyen 2(a) yang mana Puan Majistret yang terpelajar boleh memberi amaran berdasarkan kepada kes berkenaan.

In fact, throughout the learned DPP's submissions, there is no reference at all to s. 294 of the CPC. It is only now in the notice of appeal that the appellant has alluded to s. 294, ie, for the first time. Nevertheless, I will consider the issue raised in the question of law framed for the Court of Appeal.

[6] Now, the offence is one under s. 6(3) of the Act, which reads:

> (3) Any person undergoing supervision under paragraph (1)(a) or (b) who fails to comply with any condition imposed under subsection (2) shall be guilty of an offence and shall on conviction be liable to be punished with imprisonment for a period not exceeding three years or to whipping not exceeding three strokes or to both.

The prescribed sentence for an offence under s. 6(3) of the Act is mandatory imprisonment of up to three years or to whipping not exceeding three strokes or both. However, the learned Magistrate had cautioned and discharged the respondent. There is no indication in the grounds of judgment or the notes of proceedings as to whether the learned Magistrate exercised her discretion under s. 173A or s. 294 of the CPC, for both these sections allows her to do so.

[7] Section 173A of the CPC provides:

> (2) When any person is charged before the Court with an offence punishable by such Court, and the Court finds that the charge is proved, but is of opinion that, having regard to the character,

A antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment or that it is expedient to release the offender on probation, the Court may, without proceeding to record a
B conviction, make an order either:

(a) dismissing the charge or complaint after an admonition or a caution to the offender as the Court seems fit; or

(b) discharge the offender conditionally on his entering into a bond with or without sureties, to be of good behaviour and to appear
C for the conviction to be recorded and for sentence when called upon at any time during such period, not exceeding three years, as may be specified in the order.

Whilst s. 294 of Criminal Procedure Code reads:

D (1) When any person has been convicted of any offence before any Court if it appears to the Court that regard being had to the character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed it is expedient that the offender be released on probation of good
E conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond with or without sureties and during such period as the Court may direct to appear and receive judgment if and when called upon and in the meantime to keep the peace and be of good behaviour.

F **[8]** Section 173A is used without recording a conviction, whilst s. 294 is resorted to after the recording of a conviction. Hence, from a reading of the notes of proceedings, it can be seen that the Magistrate had recorded a conviction and then proceeded to hear submissions on sentencing. Thus, it can be surmised that the learned Magistrate had acted under s. 294 and not
G 173A of the CPC in making her decision.

[9] Though the marginal note to s. 294 reads "first offender", the application of this section is not limited to first offenders only as was pointed out by Abdoolcader J (as he then was) in *PP v. Yeong Yin Choy* [1976] 1 LNS 119; [1976] 2 MLJ 267 at 268 in the following words:

H The marginal note to section 294 would appear to be misleading and would not seem to reflect or project the true purpose and purport of its provisions. The essential prerequisites for the application of section 294 would be:

(a) the conviction

I (b) of an adult offender (not being a youthful offender as defined in section 2 of the Code)

(c) for an offence punishable with imprisonment

(d) and it appears to the court so convicting, regard being had to the character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed

(e) that it is expedient that the offender be released on probation of good conduct.

It is only necessary in these proceedings for revision to consider whether or not section 294 is applicable in a case of the conviction for an offence such as is specified in section 324 of the Penal Code which provides for punishment by way of imprisonment or the alternative penalties of fine or whipping.

... ...

The application of the provisions of section 294 to an offence punishable only with a fine would clearly be dehors its ambit, but I can see no reason why that statutory provision in the Code cannot and should not apply to the case of a conviction for an offence punishable with imprisonment with the option of a fine or any other alternative stipulated punishment such as whipping as is provided for in section 324 of the Penal Code, as such an offence is surely and equally an offence punishable with imprisonment. That this is indeed so is in my view wholly substantiated and borne out by the provision in that section that "the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond ..." If that section were restricted to offences punishable with imprisonment and imprisonment only, then the words "to any punishment", which *ex vi termini* would certainly seem to transcend the confines of imprisonment *per se*, would and should instead read "to imprisonment"; the words as enacted make no sense otherwise in relation to the restrictive connotation put by Thomson J's *dictum* in *Public Prosecutor v. Idris* [1955] MLJ 234 235 on the nature of the punishment prescribed for the offence.

[10] Although Abdoolcader J disagreed with the observation of Thomson J (as he then was) in *PP v. Idris* [1955] 1 LNS 93; [1955] MLJ 234, on the restrictive reading of s. 294 of the CPC, he nevertheless agreed with the view of Thomson J on the difference between s. 173A and 294, that is, s. 173A should be reserved for cases which are thought to call for unusually lenient treatment whereas s. 294 is to be applied in cases where the offence is generally of a serious nature punishable with imprisonment and the offender is an adult. According to Abdoolcader J in *PP v. Yeong Yin Choy*:

I would think that the essential difference in the application of the provisions of section 294 and section 173A of the Code is that the latter is normally intended to be utilised in cases of minor import and calling for exceptionally mild treatment affecting adult and youthful offenders alike where the nature of the offence, the extenuating circumstances of

A the case and factors peculiar to the offender in question justify and perhaps even require that no conviction be recorded against him, so that although he is either admonished or cautioned or discharged conditionally as provided therein there remains no blemish or stain against him by reason of a conviction being recorded.

B **[11]** In *PP v. Lim Hong Chin* [1994] 1 CLJ 79; [1993] 3 MLJ 736, a case involving the binding over of the offender under s. 294 of the CPC for an offence of voluntarily assisting in the disposal of certain articles knowing them to be stolen property, ie, an offence under s. 414 of the Penal Code, Chong Siew Fai J (as he then was) after considering several case authorities C on the application of s. 294 of the CPC, followed *PP v. Yeong Yin Choy* and held that:

In this appeal, the learned deputy public prosecutor raised the availability of s. 294(i) of the Code having regard to the form of punishment provided for the offence in the Penal Code (FMS Cap 45), and further contended that even if the said s. 294(i) was capable, in law, of being applied, it was D wrongly resorted to having regard to the nature of the offence committed and by taking irrelevant factors into consideration.

In relation to the applicability of the said s. 294(i), the issue raised was whether the discretion to invoke the subsection could be exercised in offences as the present one where they were punishable with E imprisonment or fine or both. The learned deputy public prosecutor contended that there was no discretion to invoke the said s. 294(i) in the circumstance, citing *PP v. Loo Choon Fatt* and *PP v Idris*.

There appears to have been no Supreme Court decision on the point. A number of cases at the High Court level applied or approved the use of F the said s. 294(i) without dwelling upon the issue raised above, eg *Raja Izzuddin Shah v. PP*; *Teo Siew Peng & Ors v. PP*; and *Tan Khoon Eng v. PP*.

As to the two cases referred to by the learned deputy public prosecutor:

(1) In *PP v. Idris*, Thomson J (as he then was) said (in my opinion, *obiter)* that s. 294 of the Code applied only to offences punishable with G imprisonment without the option of a fine. I say *obiter* because there the offence involved (s. 4(2) of the Motor Vehicles (Driving Offences) Proclamation) was punishable with a fine only and the observation of Thomson J was made in the course of distinguishing ss. 173A and 294 of the Code.

H (2) In *PP v. Loo Choon Fatt*, Hashim Yeop A Sani J (as he then was) was of the opinion that s. 294 of the Code could not be applied to an offence under s. 12(2) of the Dangerous Drugs Ordinance 1952 because of the alternative punishment of either a fine or imprisonment therein provided.

I Holding the contrary view is the case of *PP v. Yeong Yin Choy*. In that case, the sole question referred for determination was whether s. 294 of the Code was applicable to an offence punishable with imprisonment with the option of a fine. Abdoolcader J (as he then was) after discussing at length,

concluded that the provisions of s. 294 were applicable in the case of a conviction for an offence punishable with imprisonment whether with or without the option of a fine or other alternative penalties.

After some anxious consideration and with the greatest respect, I tend to agree with *PP v. Yeong Yin Choy*. If the legislature had intended to confine the application of the said s. 294(i) to offences punishable with imprisonment only without the option of any alternative penalty, it would have expressly so enacted by using some appropriate words to that effect or by simply adding the word 'only' in the appropriate place in the said s. 294(i). In any event, this being a penal law, the benefit of doubt of any uncertainty should be given to the subjects on whom penalty is to be enforced, and the provisions should be so construed that those persons who are or might reasonably be within it should not be excluded from it.

Two more recent case, however, may be mentioned:

(1) *PP v. Leonard Glenn Francis* [1989] 2 MLJ 158; and

(2) *PP v. Mohamed Nor & Ors* [1985] 2 MLJ 200, which was referred to by learned counsel for the respondent. *PP v. Leonard Glenn Francis* was a case concerning s. 8 of the Firearms (Increased Penalties) Act 1971 which provides:

> Any person who is in unlawful possession of a firearm shall be punished with imprisonment for a term which may extend to fourteen years and with whipping with not less than six strokes.

And Edgar Joseph Jr J (as he then was) said [at p. 161]:

> Once a conviction is recorded in respect of an offence under s. 8 of the Firearms (Increased Penalties) Act 1971, the provisions of s 294 of the Criminal Procedure Code are overridden and the court must proceed to impose a sentence of imprisonment and whipping with not less than six strokes.

As may be seen from the above, the said s. 8 provides not only two mandatory forms of punishment, ie imprisonment sentence and whipping, but also that the whipping has to be not less than six strokes whereas the issue raised in our present appeal is whether s. 294(i) of the Code is exercisable in offences punishable with imprisonment with the option of a fine or with both imprisonment and fine. In other words, *PP v. Leonard Glenn Francis* dealt with a penal provision different from that raised by the issue in the present appeal. The case is, therefore, to that extent, distinguishable. Also, *PP v. Yeong Yin Choy*, it may be noted, was not considered in *PP v. Leonard Glenn Francis*.

As regards the case of *PP v. Mohamed Nor & Ors*, (a Supreme Court decision) although that case did not deal directly with the issue raised in the instant appeal before me, there is some indication that s. 294(i) of the Code may be properly invoked. That case involved s. 298A of the Penal Code (FMS Cap 45) which, at the material time, provided punishment of imprisonment for a term that might extend to three years, or with a fine,

A or with both - similar form of wording as that in s. 414 of the Penal Code (FMS Cap 45). The Supreme Court declined to interfere with the decision of the High Court imposing 'binding over' orders under the said s. 294.

[12] When these case authorities are considered in some detail, it is apparent that there are two diametrically opposed views at the High Court B level. One view, as espoused by Abdoolcader J and accepted by Chong Siew Fai J, is that s. 294 of the CPC is applicable even when the offence is one where a mandatory minimum sentence is imposed, and the other as propounded by Edgar Joseph Jr J is that the provisions of s. 294 of the CPC are overridden by a mandatory sentence of imprisonment mandated for any C offence and that the court must proceed to impose a sentence of imprisonment for offences of such nature.

[13] This issue again arose for consideration by Nallini J (as she then was) in *PP v. Bahar Abu* [2007] 4 CLJ 604; [2007] 8 MLJ 219 and in a well-considered, reasoned and articulated judgment concerning the applicability D of s. 294 CPC to an offence of dishonestly receiving or retaining a stolen motorcycle under s. 411 of the Penal Code which prescribes a mandatory minimum sentence, the learned judge had this to say:

> [10] This section envisages that where a Court is by law empowered to impose the punishment of imprisonment, it may, in its discretion, E provided one or more of the criteria set out in the section are met, direct that the accused be released on a bond rather than be imprisoned. Section 411 of the PC is such a section. It provides for imprisonment particularly in relation to motor-vehicles, as is the case here, and specifically utilises the words 'shall be punished with imprisonment'. If indeed a term of imprisonment is mandatory, can F the Court still exercise its jurisdiction under s. 294 of the CPC to release the respondent on a bond of good behaviour?
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> ... ...
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> [12] Can a good behaviour bond be imposed where the penalty prescribed by law is a mandatory sentence of imprisonment? It G would appear so.
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> [13] In *PP v. Idris* [1955] MLJ 234, Thomson J (as he then was) advised magistrates that s 294 of the CPC was only applicable in the case of offences punishable with imprisonment. This was subsequently extended to include offences which prescribed alternative H punishments in *PP v. Yeong Yin Choy* [1976] 2 MLJ 267. However, it is implicit in these decisions that s. 294 of the CPC may be utilised whether the terms of sentence prescribed use the mandatory form 'shall be punished' or otherwise.
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> [14] Similarly in *PP v. Lim Hong Chin* [1993] 3 MLJ 736, this issue, ie, I whether s. 294 of the CPC could be utilised where alternative forms of punishment were provided for, was considered. The offence committed was under s. 414 of the PC, which like s. 411 of the PC,

provides for the alternative punishments of imprisonment or fine or both but when the stolen property is a motor-vehicle or a component part, the section prescribes that the offender '... shall be punished with imprisonment for a term of not less than six months and not more than seven years and shall also be liable to fine ...' In that case, the magistrate had released the offender on a good behaviour bond. Chong Siew Fai J followed the decision in *PP v. Yeong Yin Choy* [1976] 2 MLJ 267 and held that the provisions of s. 294 of the CPC are applicable where the offence prescribes alternative forms of punishment.

[15] Again it is implied in this decision that even in cases where there is a mandatory requirement for imprisonment, s. 294 of the CPC can still be utilised by a court in dealing with an offender. And in *Winston Rajah v. PP* [1999] 1 CLJ 315, Richard Malanjun J (as His Lordship then was) stated in the course of his judgment that he had no reason to doubt the correctness of the contention that '... the existence of a minimum sentence does not deprive this court from exercising its discretion under s. 294 of the CPC.'

[16] The words 'punishable by imprisonment' found in s. 294 of the CPC indicate that it is applicable to offences that 'can' be punished by imprisonment. Both a mandatory and an optional imposition of a sentence of imprisonment are instances where a court 'can' punish by imprisonment. It would therefore follow that the Court has a discretion to utilise the section even where the sentence prescribed is a mandatory term of imprisonment. If the circumstances of the offence are 'inappropriate' for the application of s. 294 of the CPC, the Court can decline to exercise its discretion to use the section (see *Teh Ah Cheng v. PP* [1976] 2 MLJ 186).

[17] However, a different approach was taken by Edgar Joseph Jr J (as he then was) in *PP v. Leonard Glenn Francis* [1989] 2 MLJ 158. There the accused pleaded guilty to charges of unlawful possession of firearms which was punishable under s. 8 of the Firearms (Increased Penalties) Act 1971. That section provides that any person who is in unlawful possession of a firearm '... shall be punished with imprisonment for a term which may extend to fourteen years and with whipping with not less than six years ...'. The Sessions Court made an order for the accused to be bound over under s. 294 of the CPC. Edgar Joseph Jr J (as he then was) held that the Sessions Court was in error. Once the accused was convicted under s. 8 of the said Act, the learned judge held that the provisions of s. 294 of the CPC were overridden and the court had no option but to impose a sentence of imprisonment and whipping. The provisions of the statute being mandatory in nature, they overrode the discretion vested in the court under s. 294 of the CPC, thereby precluding its use. In *PP v. Mohd Tajuddin Ahmad* [1997] 2 CLJ 913, Mohd Noor Abdullah J (as he then was) held that in view of the peremptory language used in s. 376 of the PC which

provides on conviction for a term of imprisonment, an imposition of a sentence under either s. 173A or s. 294 of the CPC would be illegal.

[18] In *PP v. Kandasamy a/l Muniandy*, Dato' Zaharah Ibrahim J considered the exact issue that is before this Court and came to the conclusion that the provisions of s. 294 of the CPC were not ousted by s 411 of the PC, after examining *inter alia*, the decisions of the Supreme Court in *PP v Mohamed Nor & Ors* [1985] 2 MLJ 200 and *Nordin Yusmadi v. PP* [1997] 3 MLJ 754. In the former case, the High Court had dealt with the offender under s. 294 of the CPC in respect of an offence under s. 298A, which deals with causing disharmony, disunity or feelings of enmity, hatred or ill-will on grounds of religion. The Supreme Court, although it expressed the opinion that s. 294 of the CPC was inappropriate and that a term of imprisonment was more appropriate, did not interfere with the sentence imposed by the High Court. By implication therefore, the utilisation of s. 294 of the CPC was not precluded nor stated to be illegal or overridden. Subsequent to this case, s. 298A of the PC was amended by the insertion of express provisions in the form of s. 298A(2), which provides that s. 173A and s. 294 of the CPC shall not apply in respect of offences under this section. This amendment lends further weight to the applicability of s. 294 of the CPC in other sections of the Penal Code where similar words, ie 'shall be punished with imprisonment' are used but where there are no such express exclusions of these two sections.

[19] In *Nordin Yusmadi v. PP*, where the offender was charged under s. 376 of the PC, and the Sessions Court ordered that the accused be detained at the Henry Gurney school until the age of 21 years, the High Court set aside this order and substituted a sentence of five years imprisonment on the basis that the section provided for a mandatory minimum sentence of imprisonment of five years. The Court of Appeal held that in suitable circumstances an order under s. 40 of the Juvenile Courts Act 1947 could be imposed (as had been done by the Sessions Court) even if a mandatory sentence of imprisonment was provided for. In the course of its judgment, the Court of Appeal impliedly approved the position that s. 173 s. 294 of the CPC are applicable to convictions under s. 376 when it commented:

> ... the learned senior federal counsel appearing for the respondent **while conceding that s. 40 of the Act is applicable to convictions under s. 376 of the Code, just as the provisions of s. 173 [sic] and s. 294 of the Criminal Procedure Code (FMS Cap 6)** questions whether the facts of the present case justify the learned sessions judge to act under s. 40 of the Act. (emphasis added).

[20] In view of the decisions of the Court of Appeal and Supreme Court in the aforesaid cases, as well as the existence of express exclusionary sections in the Penal Code where s. 173A and s. 294 of the CPC are not to be used, it would appear that notwithstanding

> the mandatory nature of the provisions of imprisonment provided under s. 411 of the PC, it is open to the magistrate to deal with such an offender under s. 294 of the CPC. Therefore in the instant case, the learned magistrate did not fall into error when dealing with the respondent under s. 294 of the CPC in respect of an offence under s. 411 of the PC.

[14] I have quoted extensively from the judgment of Nallini J for it succinctly dissects the arguments and makes a pointed conclusion, with which I am in total agreement. It is quite evident that the Supreme Court's decision in *PP v. Mohamed Nor & Ors* [1985] 1 LNS 25; [1985] 2 MLJ 200 and the Court of Appeal's decision in *Nordin Yusmadi Yusoff v. PP* [1997] 4 CLJ 25; [1997] 3 MLJ 754 have laid to rest the conflicting High Court positions as regards the applicability of s. 294 CPC to offences where mandatory imprisonment is the prescribed sentence. Thus, in my opinion, the learned Magistrate had the power and discretion to deal with the respondent under s. 294 of the CPC, notwithstanding the fact that an offence under s. 6(3) of the Act carried a mandatory term of imprisonment not exceeding three years or three strokes of the whip or both.

[15] Hence, what remains to be considered is, whether in the circumstance of the facts of the case, the learned Magistrate was justified in exercising her powers to admonish and discharge the respondent with a warning to the respondent to diligently report to the Ayer Keroh Police Station once every month as stipulated in the SO.

[16] Section 294 of the CPC clearly provides that certain prerequisites are to be met in order that a court may exercise its discretion thereunder. These requirements were described in *PP v. Yeong Yin Choy (supra)* by Abdoolcader J and I have referred to them above. In her grounds of judgment, the learned Magistrate stated that she took into account the following in arriving at her decision to release the respondent with an admonition:

(a) that the respondent was a first offender;

(b) that he had pleaded guilty;

(c) that he had just married and had a non-working wife. He worked as a part-time technician and supported his father who was aged and ill;

(d) that he was enrolled as a part-time student at University Utara Malaysia in business management and trying to improve himself;

(e) that he had shown a commitment to his treatment and rehabilitation by attending the monthly program conducted by the Agensi Antidadah Kebangsaan (AADK) and had adduced documentary evidence in support of this;

(f) that public interest is best served in treating and rehabilitating the respondent rather criminalising him by sentencing him to incarnation at public cost. Therefore, it is expedient to admonish the respondent and release him to continue with his treatment and rehabilitation as order in the SO; and

(g) the SO was still in force and was to expire on 6 May 2018, and the terms of the SO were akin to the terms of a bond for good behaviour.

[17] I find that the learned Magistrate had properly exercised her discretion and in particular had given appropriate consideration to the extenuating circumstances under which the offence was committed. The prosecution's case was that the respondent failed to report on a monthly basis at the Ayer Keroh Police Station. This is the only breach of the conditions of the SO. The respondent whilst admitting that he failed to report to the police station as ordered in the SO said that he was under a mistaken belief that his participation at the AADK monthly drug rehabilitation programs was sufficient. The AADK officer Encik Mazlan and Encik Razali bin Mohd Jan, Timb. Pengerusi PENGASIH, a private initiative drug rehabilitation non-governmental organisation, were present in court at both the Magistrate's Court and the High Court. They confirmed that the respondent was diligently following their programs and was committed to his treatment and rehabilitation. The respondent's parents were also present in court in support of him. The respondent's commitment in attending the rehabilitation program run by the AADK is reflective of him fulfilling one of the conditions of the SO, that is:

> (f) orang tersebut hendaklah menjalani apa-apa program bagi pemulihan penagih dadah yang diadakan oleh Kerajaan.

[18] This to my mind is the core component of any drug rehabilitation program. And in regard to this very important factor, the learned Magistrate in her grounds of judgment states:

> Dalam kes ini sungguhpun Responden mengakui tidak melapor diri di Balai Polis Ayer Keroh, Responden telah menunjukkan komitmen yang baik dengan setiap bulan di Agensi Antidadah Kebangsaan (AADK) dan ianya dibuktikan dengan mengemukakan rekod kehadiran program anjuran AADK ke Mahkamah pada hari tersebut. Responden telah hadir ke program orientasi dan ceramah dan saya percaya program-program tersebut mempunyai tujuan dan matlamat yang sama iaitu membendung pesalah yang diletakkan di bawah Perintah Pengawasan daripada mengulangi dan terjebak ke dalam kancah penyalahgunaan dadah sekali lagi.
>
> ... ...
>
> Sebelum saya memutuskan untuk memberikan perintah pelepasan berserta amaran kepada Responden, saya telah terlebih dahulu melihat kepada peruntukan hukuman bagi kesalahan yang dilakukan. Di dalam kes ini hukuman yang diperuntukkan hanyalah penjara dan sebatan atau kedua-

duanya. Kedua-dua bentuk hukuman ini sekiranya diberikan adalah agak keterlaluan sekiranya saya mengambilkira faktor ke-3 ini. Terdapat jurang dan perbezaan antara OKT yang memberikan kerjasama dengan hadir program pemulihan dengan OKT yang tidak melaporkan diri langsung selepas perintah diberikan. Atas sebab itu saya cenderung untuk memberikan budibicara untuk perintah berbeza setelah mempertimbangkan faktor kerjasama yang diberikan oleh Responden.

Saya juga mengambilkira faktor Responden sebagai seorang pelajar separuh masa di university awam yang berusaha untuk meningkatkan taraf hidupnya dengan menimba ilmu biarpun sudah berumahtangga dan bekerja. Adalah sangat sia-sia sekiranya ini tersekat separuh jalan hanya kerana tidak melapor diri sedangkan perkara tersebut boleh diberi pertimbangan. Saya juga tidak sewenang-wenangnya melepaskan Responden, sebaliknya mengarahkan dirinya menyambung melapor diri di balai tanpa gagal sebagaimana perintah di Borang 4. Ini bermaksud hukuman lebih berat akan dikenakan selepas ini sekiranya Responden masih enggan atau ingkar dalam melaksanakan perintah tersebut.

This well-reasoned approach on the part of the learned Magistrate is in my opinion the proper approach to be adopted in the circumstances of the case. The learned Magistrate has well distilled the legal principles and applied them to the facts and given pertinent consideration to these facts. The approach taken by the learned Magistrate focuses on the purposive approach to the legislation in question, which is the treatment and rehabilitation of the drug dependant. This approach is in consonant with the preamble to the Act, which states that the object of the Act is:

... to provide for the treatment and rehabilitation of drug dependants and for matters connected therewith.

[19] I agree with the learned Magistrate that public interest is best served by not imprisoning the respondent, and instead it is best served by ensuring that he continues with the treatment and rehabilitation. Public interest is the foremost consideration in any sentencing decision. And that interest is best served if the offender is induced to turn from criminal ways to honest living, and keep society safe. In this case, the factual matrix indicates that public interest would be best served if the respondent were to free himself from the shackles of drug dependence and become a productive citizen.

[20] During the course of submissions, I had enquired of the learned DPP as to the purport and import of any supervisee under a s. 4 supervision order, such as the respondent, in reporting to police station on a monthly basis. The learned DPP informed the court that the respondent would just present himself at the police station and sign on the attendance register and leave. There was no other purpose in the respondent attending at the police station. If that were so, then surely the respondent's attendance at the monthly programs conducted by AADK and also undergoing treatment and rehabilitation by PENGASIH must be lauded and preferred to the mere reporting at the police station, for it has a more direct and advantageous

bearing on his treatment and rehabilitation. I also enquired of the learned DPP if any random or periodic testing of the respondent's urine sample was done when he reported at the police station, and her answer was in the negative. If at least the police were to conduct such random urine testing when the respondent made his monthly reporting, then it could be surmised that his absence would be to escape such tests for fear of its result, and in which case a prison sentence could have been considered more appropriate, not just as a punishment to the respondent but as deterrence to others. Alas, that was not the case here.

[21] Wherefore, I affirmed the decision of the learned Magistrate and dismissed the appeal.